

B. W. H. asks the Appeals Board of the Utah Labor Commission to reconsider its prior decision that Southern Utah University (“S.U.U.” hereafter) is entitled to summary dismissal of Mr. H.’s claim of age discrimination under the Utah Antidiscrimination Act (“the Act”; Title 34A, Chapter 5, Utah Code Annotated).

The Appeals Board exercises jurisdiction over this matter pursuant to Utah Code Ann. §63-46b-13.

BACKGROUND AND ISSUES PRESENTED

Dr. H. applied for two faculty positions at S.U.U. When younger candidates, Dr. Armstrong and Dr. Bahi, were selected for the positions, Dr. H. filed a discrimination complaint. The Utah Antidiscrimination and Labor Division (“UALD”) investigated, but found no cause to believe that unlawful discrimination had occurred. Dr. H. appealed UALD’s determination to the Commission’s Adjudication Division, where the matter was assigned to Judge Eblen.

In the course of proceedings before Judge Eblen, S.U.U. moved for summary dismissal of Dr. H.’s complaint. Judge Eblen granted the motion based on her conclusion that undisputed facts prevented Dr. H. from prevailing on his complaint. On review, the Appeals Board affirmed Judge Eblen’s decision.

Dr. H. now asks the Appeals Board to review its prior decision. In support of his request for review, Dr. H. argues that various facts regarding his qualifications, as well as Dr. Bahi’s qualifications, are in dispute. Dr. H. contends that these disputed questions of fact preclude summary judgment in this matter.

DISCUSSION

In its prior decision, the Appeals Board noted that Dr. H.’s complaint cannot be summarily dismissed if evidence has been presented that can be rationally viewed as discrediting the non-discriminatory explanation S.U.U. has proffered for hiring Dr. Armstrong and Dr. Bahi. The Appeals Board also noted that, while the Utah Antidiscrimination Act prohibits invidious employment discrimination, it does not interfere with bona fide nondiscriminatory selection and management decisions. Consequently, “(a)n employer has the discretion to choose among candidates so long as the decision is not based on unlawful criteria. Although the employee, and even the judge, may believe that the employer *misjudged* the qualifications of the applicants, that does not, without more, subject the employer to liability under the Act.” University of Utah v. Industrial Commission, 736 P.2d 630, 635 (Utah 1987).

In this case, S.U.U. has presented evidence of nondiscriminatory factors which motivated it to select Dr. Armstrong and Dr. Bahi for the faculty positions, rather than Dr. H.. Those factors are detailed in the Appeals Board’s prior decision. Having reviewed these factors once again, the Appeals Board concludes that the evidence cannot reasonably be viewed as creating a factual dispute regarding S.U.U.’s stated reasons for selecting Dr. Armstrong and Dr. Bahi over Dr. H.. A difference of opinion does not preclude summary judgment. In other words, whether

or not S.U.U. was successful in selecting the best candidates, S.U.U. made its decision on the basis of nondiscriminatory factors. The Appeals Board therefore concludes that summary judgment has properly been granted against Dr. H..

ORDER

The Appeals Board reaffirms its prior decision in this matter and denies Dr. H.'s request for reconsideration. It is so ordered.

Dated this 27th day of February, 2004.

Colleen S. Colton, Chair

Patricia S. Drawe

Joseph Hatch